September 12, 2005

Theodore Olson, "John Roberts deserves a dignified hearing," Wall Street Journal, 9/12/05

Noteworthy

"Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them….I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat." – **Judge John Roberts, 9/12/05**

Sens. Leahy and Kennedy have already used the victims of Katrina in their opening statement in an attempt to score political points. Others likely will make similar attempts in a bizarre effort to link Judge Roberts to the tragedies in the Gulf of Mexico. But Katrina victims should not be used to score political points.

Sen. Cornyn made the following statement about such tactics:

"I believe the American people will see this for what it is. We ought not to appropriate a national tragedy in a misguided effort to further a political interest of any sort."

"John Roberts' extensive legal experience, outstanding record of public service and his distinguished tenure on the D.C. Circuit make him an ideal candidate to serve on the highest Court in the land. Above all, he's a good and honest person—a man of principle, integrity, and character, a devoted husband, and a loving father. John Roberts is the type of Supreme Court nominee that America needs, and he deserves the courtesy of a fair confirmation process. As the committee proceeds with questioning over the next few days, ***I urge my colleagues to treat Judge Roberts with the dignity and respect that he deserves. I am hopeful that the hearings will be fair and thoughtful, and that Members***

will not ask Judge Roberts to compromise his judicial independence by requiring him to pre-judge cases and issues that may come before the high court. **– Senator Frist, 9/12/05**

"Judge, . . . you not only have a right to choose what you will answer and not answer, but in my view you should not answer a question of what your view will be on an issue that clearly is going to come before the Court in 50 different forms, probably."
Senator Biden, ***Confirmation Hearing for Ruth Bader Ginsberg, July 1993, at p. 275-276***

"Just two years ago he was confirmed by unanimous consent of the U.S. Senate to the District of Columbia Court of Appeals. So we know an awful lot about him. And in fact, during the course of these confirmation proceedings, the White House and the various archives have produced -- and Judge Roberts himself -- more than 100,000 individual pages of documents about his records spanning decades. So to suggest that there is some stone that has been left unturned or something that the senators don't know about this nominee just avoids that fact, which is that ***we know more about this nominee than has been known about any nominee in the history of the United States Senate or the history of the United States Supreme Court."*** **- Senator Cornyn, 9/12/05**

"The confirmation hearings have always been about whether or not the president's nominee will get an up or down vote. The only way he would not be confirmed is through a filibuster. And that's been a rare thing in the senate until recently. After his opening statement today, I don't believe anybody will be able to mount a challenge that he's out of the mainstream, that he's the kind of person that should not be on the court because she should be afraid of him. He came across as a guy well-founded in what he believes, well schooled in the law, possessing the intellect and the integrity to sit on the court. He's a conservative. To expect George W. Bush to appoint anyone other than a conservative, you didn't listen to the last two elections. Ginsburg was liberal. She got 96 votes. Scalia was conservative. He got 98 votes. ***How many will Roberts get? If people judge him based on his qualifications and the way he's lived his life, he should get 100 votes."*** **– Senator Graham, 9/12/05**

"You [Judge Roberts], sir, have the talent, experience, and humility to be an outstanding member of the United States Supreme Court. And ***I expect these hearings to show that you have the appropriate philosophy to lead our nation into the future as the 17th chief justice of the United States.***" **– Senator DeWine, 9/12/05**

John Roberts Deserves a Dignified Hearing

By THEODORE B. OLSON
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Our nation is in the process of replacing two of its most distinguished jurists and over 57 years of accumulated wisdom on its highest court. Sandra Day O'Connor provided keen instincts, common sense and poise since her appointment in 1981. William H. Rehnquist gave the Court 33 years of penetrating intelligence and integrity, 19 of them as chief justice. It would be refreshing if the confirmation of their successors could be conducted with the same class that characterized these two careers. Don't bet on it.

A political Gresham's law has debased Senate confirmation proceedings so that they now tend to combine the worst features of reality TV, professional wrestling and celebrity criminal trials. And the more lofty the judicial position, the more the process has sunk into an unseemly and demeaning spectacle. The pathway to service on our most prestigious courts has come to resemble a theater of the absurd, during which prospective judges are probed, humiliated, scolded and scorned. Those who somehow make it through the excruciating process may be forgiven for being embittered by the experience.

Despite the politically charged controversies over the direction and role of the courts in our society, the public has generally maintained an almost reverential respect for our judiciary, and continues to regard judges as decent, fair and remarkably free of corruption. Why, then, must the process by which their appointments are confirmed be so raw and blatantly partisan?

I concede a certain bias. For nearly 25 years, I have known and practiced law with and against John Roberts. I cannot imagine a more gracious, thoughtful and warm individual -- or a more highly qualified person to occupy a seat on the Supreme Court. There is simply no legitimate or rational basis for the carefully orchestrated, heavily bankrolled, hyperbolic and often plain nasty attacks being launched against him.

Sadly, Judge Roberts is only experiencing the ritual aspects of the contemporary judicial confirmation process: invasions of his privacy; distortions of his record, including attacks on the most trivial or casual (and long-forgotten) utterances; and apocalyptic predictions concerning the imagined consequences of his confirmation. These tactics have worked in the past, so there is no price to be paid for using them. We therefore seem destined endlessly to relive them.

Two additional strategies will be deployed in the Roberts hearings. His Senatorial inquisitors will pose questions designed to pin down how he might rule on a particular issue (abortion, for example). They, along with various interest groups, will also complain that the White House has failed to produce confidential materials he may have authored as an administration lawyer. Both tactics are win-win for his opponents: The nominee will either submit, only to be hammered for positions he has taken, usually wrenched completely out of context -- or he will resist, opening himself to accusations of being evasive, arrogant or a stonewaller.

This sort of gamesmanship is not worthy of the Senate or the judiciary. Aside from those who benefit financially from the fundraising opportunities presented by a confirmation battle, and those who are titillated by the opportunity to witness -- or participate in -- a public flogging, most of our citizens don't like what they are seeing. The solution, if one exists, is for the public to cry foul whenever a senator seeks to pollute a dignified confirmation proceeding with cheap rhetorical theatrics and demagoguery.

As many of Judge Roberts' predecessors have explained, including, most recently, Justice Ruth Bader Ginsburg, it is ill-advised for a candidate for judicial office to express a formulated position on even the most fundamental questions that might later come before the Court. It may be expedient for a nominee to express support for *Brown v. Board of Education* or *Marbury v. Madison* or to reject the *Dred Scott* decision. Nearly everyone would nod approvingly, at least in the abstract. But where do such answers lead, and where does the pandering end? The simple fact is that there is no principled line to draw once a nominee starts down that seductive slope.

The most appropriate response to these questions is for the nominee to promise an open mind in every case, receptivity to the arguments of counsel, the views of colleagues and due respect for the written text, history, precedent, context and factual setting of a particular matter. And he should promise to render future decisions free from preconceived or pre-expressed opinions as to how a case should be decided. We expect no less from a judge; and that is the *only* response we should expect to hear during confirmation proceedings. Anything else bargains away future judicial independence.

As to the memoranda John Roberts wrote as deputy solicitor general, they are sensitive, deliberative analyses of cases pending at the time, inseparable from memoranda written by career Justice Department personnel. They candidly evaluate the positions taken or urged by government lawyers, comment on judicial decisions, and evaluate the strengths of the government's case. They are developed with the expectation that they will remain confidential. In Judge Roberts' case, they may even contain assessments of the justices with whom he may soon be serving. Failure to protect the integrity of these materials will not only damage the public interest in top-flight government lawyering, but will forever inhibit future officials from frank internal assessments of litigation strategy.

Solicitors-General for Presidents Kennedy, Johnson, Nixon, Ford, Reagan, Clinton and both Bushes have firmly emphasized the vital importance of protecting the confidentiality of these records. No partisan impulse motivated the uniform public expression of that position, and there is no justification for breaking with that tradition. The price for doing so will be paid by every future president -- and the nation.

The Senate confirmation process should be conducted with the same dignity, restraint and professionalism that we expect from judges. Before the commencement of the impeachment trial of President Clinton, over which he was to preside, Chief Justice Rehnquist gathered members of Congress before him. He had only two words of advice: "Be fair." That simple yet wise admonition should dictate the tone of the Senate's confirmation of his successor.

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